Rapporteur Report: Perspectives of Stakeholders
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I. Introduction

As critical stakeholders, states and investors are a focal point for the Joint Symposium on International Investment and Alternative Dispute Resolution (ADR). The Symposium aims to address the current status of the investor-state dispute resolution process, discuss alternatives to the present system, and explore how those alternatives can yield better outcomes. The objective is to create an improved investor-state dispute resolution system that provides greater predictability, promotes systemic legitimacy, and offers faster, cheaper, and fairer results for investors and states alike. The success of ADR in the international investment context has consequences for the continued and expanded use of foreign investment as a force for economic growth and development across the globe. In order to provide a complete picture, this Report uses a broad notion of stakeholder that extends to include counsel, institutions, and arbitrators, as well as states and investors.

The pre-conference discussion on stakeholder perspectives provided a fruitful discussion on the current state of investor-state dispute resolution and addressed issues for future consideration. Much of the discussion focused on states—both as the host states for foreign investment and as the investors' home states. One critical area for consideration at the Joint Symposium will be the exploration of the role of states as well as the perspectives of investors, counsel, institutions, arbitrators, and other players. Effectively creating ADR models for investment disputes will best be achieved through a balanced discussion involving multiple groups of stakeholders.

II. Synthesis of the Pre-Symposium Discussion

The pre-symposium discussion focused on the role that states play in the resolution of investment disputes, especially in a depoliticized dispute resolution environment. One commentator considered the role that states play in avoiding disputes in the first instance and the possibility of the investor's state inadvertently re-politicizing dispute resolution, which was described as normatively undesirable. On the other hand, others expressed the increased need for states to play a role in the interpretation of investment treaties and establishing precedent for current and future disputes. One commentator suggested that the absence of precedent in international investment dispute resolution is an area of concern for states. Another observer noted that often states do not become involved in the dispute resolution process until intervention is no longer effective and, instead, recommended the increased presence of states at earlier stages of the dispute resolution process. Another potential area of concern arises as a result of the arbitration

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1 For the purposes of the Joint Symposium, ADR is defined as an approach to the settlement of disputes by means other than binding decisions made by courts or tribunals. See Research Library, Glossary of Terms: Alternative Dispute Resolution (ADR), http://investmentadr.wlu.edu/resources/page.asp?pageid=587#ad (last visited Mar. 18, 2010).
process itself. One commentator focused attention on investors within the arbitration process, and the enforceability concerns when a state has no assets that can be attached. Alternatively, another commentator described how a state might take other measures, including domestic law reform and bi-lateral commercial relationships, to promote foreign investment and focus less on international investment regimes, such as International Investment Agreements (IIAs). This commentator indicated that a reluctance to engage in investor-state dispute resolution may arise from the belief that IIAs are not a per se necessary precondition for attracting foreign direct investment (FDI) at home; but nevertheless there may be an interest in providing protection to the state's citizens making investments abroad.

A prominent theme was the dual role that states play in the investor-state dispute resolution process. States play one role in seeking to attract investment, but another role in attempting to protect their investors abroad. Representatives from two developing countries highlighted this duality. Having observed transitions in their own countries, some commentators recognized the importance of the government's role in engineering systems that both solicit foreign investment but now also seek to protect their investors abroad. One commentator encouraged the increased use of a rules-based dispute resolution process as beneficial to their state in its dual roles, but acknowledged that the high costs of the current investor-state dispute resolution system make the modern process untenable for smaller investors abroad. Other commentators questioned whether there is value in dispute resolution approaches that do not focus on rules-based results but nevertheless consider what it means to "bargain in the shadow of the law." To assist the process of rules-based or interest-based dispute resolution, one stakeholder expressed a need for governments to offer training, information and manuals on investment disputes to their investors abroad, as well as to their local governments. These efforts to distribute information can also aid the development of capacity building related to IIAs, investment treaty dispute resolution and ADR.

Others delved into alternatives to the current investor-state dispute resolution process, with several stakeholders describing or proposing innovative strategies to avoid conflicts before they start. One commentator explained its country's efforts to achieve amicable settlement with foreign investors under its IIAs and offered specific examples. Some of these provisions include: (1) timeframes within which to settle a dispute before arbitrating, (2) required negotiation or conciliations through diplomatic channels, and (3) expert advice from a third party. Although there is an open question as to the precise contours of "amicable settlement," both in practice and in theory, one benchmark is to define it as anything short of arbitration.

Still others explored ideas for avoiding an investment dispute altogether. In thinking about Dispute Prevention Policies (DPPs), one person described the creation of an ombudsman for foreign investment, which involves innovative staffing choices. As the ombuds office has a civilian character separate from the state, the office is able to "amicably" facilitate an investor's potential grievances with the host state. Another commentator proposed a similar model, like a lead government agency, in which the host state creates a committee on investment that then serves to monitor investment and address potential or arising conflicts. Both of these models have the advantage of disseminating information between states and investors prior to a fully developed dispute. Closing the information gap might play a pivotal role in allowing investors and states to address conflicts before investment treaty conflict crystallizes into a formal dispute.
Another proposal advocated a regional, as opposed to national or bi-lateral, dispute resolution model. One commentator suggested that there is a perception in some developing countries that they experience differential treatment and may therefore find regional investor-state dispute resolution systems that account for the local color of dispute resolution to be more palatable. Taking a more multilateral approach, another suggestion involved the role of international organizations to manage international investment disputes. Through an informal and consensual process that allows both investors and states to win, international organizations may be in a position to facilitate amicable settlement. Nevertheless, there may still be concerns given the non-binding consent-based nature of mediated agreements, which may not necessarily address states’ and investors’ needs for finality in the same way that arbitration might.

Several commentators explored the increasingly complex environment in which foreign investment operates. Today's investment climate should address the rights of investors but also the issue of state sovereignty, such as environmental and social concerns. The lens through which each state views investment treaty arbitration will depend upon its own history with ADR, and circumstances which make the country unique. For example, one commentator focused on its home state's modern, comprehensive constitution and national dispute resolution processes. This suggested that a consideration of the utility and operation of ADR for investor-state disputes must not only address the direct needs of the state and the investor, but also country-specific characteristics and the broader needs of the society and communities directly affected by foreign investment.

III. Implications for Future Debate and Discussion

As various stakeholders explore their concerns, the discussion of solutions to the prevention and management of investment treaty conflict—and the possible use of ADR—are beginning to emerge. Moving forward, the discussion should establish the role of states, as both host states and investor's states, in creating frameworks that continue to draw investment, but that also avoid disputes before they ripen into arbitration. The views of a broad base of stakeholders will be critical for assessing these concerns and balancing solutions. We hope that the Joint Symposium's activities in Lexington will begin the process of developing this dialogue, evolving into a larger discussion about what strategies could be utilized most effectively within the larger system of IIAs and investor-state dispute settlement. The ADR strategies discussed, proposed, and generated during the Joint Symposium will pave the way for analysis and assessment for future dissemination and adaptation. We stand at a crossroads in the investor-state dispute resolution context; tomorrow’s solutions may come to fruition from seeds planted today.